IN THE

SUPREME COURT OF THE UNITED STATES

October Terms, 1978

No. 78-5944

ROOSEVELT GREEN, JR.,

Petitioner,

verses-

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on September 7, 1978.

CITATION TO OPINION BELOW

The judgment of the Supreme Court of Georgia, which has not yet been officially reported, is set out in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 7, 1978. A timely motion for rehearing was denied on September 28, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), because petitioner has asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether petitioner's sentence of death is constitutionally valid. Whether the Georgia death penalty statute, as interpreted by the Georgia Supreme Court, places unconstitutional limitations upon the consideration of mitigating circumstances.

2. Whether the Trial Court erred in sustaining the State's objection to the admission of the testimony of defendant's witness, Thomas Pasby, as a mitigating circumstance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves §27-2534.1 (Ga. Laws of 1973, pp. 159, 163), §38-301, and §38-309 of the Georgia Code, set forth as Appendix B hereto.

STATEMENT OF FACTS

Carzell Moore and Roosevelt Green, Jr., were jointly indicted on February 15, 1977, in the Superior Court of Monroe County, Georgia, for the rape and murder of Teresa Carol Allen on December 12, 1976. Following a trial by jury in which the jury found statutory aggravating circumstances, Carzell Moore was sentenced to death for both offenses. Roosevelt Green, Jr., was tried separately for only the offense of murder, was found guilty and sentenced to death upon the finding of two aggravating circumstances.

At approximately 3:00 p.m. on September 12, 1976, eighteen year old Teresa Allen arrived at her place of part-time employment, the Majik Market in Cochran, Georgia. Shortly before 7:00 p.m. the store was found to be empty. The cash register and safe were open and empty and Miss Allen's automobile was missing. It was determined that $466.00

was missing from the store.

On December 14, 1976, Miss Allen's body was discovered lying in a wooded, grassy area just off a dirt road near a State Highway in Monroe County, Georgia. Footprints, two 30.06 cartridge hulls, a 30.06 metal jacket of a bullet, parts of Miss Allen's flesh, teeth and bone, tire tracks and a nylon stocking were found near the body. The cause of her death was determined to be loss of blood from bullet wounds. Examination of the body disclosed bruising on the inside of one thigh, laceration of the vagina, and blood and mucus-like matter in the vaginal canal. At the trial a pathologist testified that the wounds in the abdomen, arms and face were caused by a high powered missile, and that the location and nature of the wounds were consistent with the theory that Miss Allen had her arms crossed across her stomach and was shot with a high powered bullet which passed through both arms and the abdomen. Miss Allen was also shot by a high powered bullet entering the left side of the neck, penetrating the lower face and exiting the right side of the head. In the early evening of the day of the robbery, Carzell Moore and Roosevelt Green, Jr., were at Carzell Moore's house, a few blocks from the location of the Majik Market. Green was wearing high heel shoes, over two inches high (T., pp. 432 and 438). A plaster cast of a foot print found near Miss Allen's body was of similar size and impression as a flat Hush Puppy shoe taken from Carzell Moore's room (T., pp. 732 and 733). Tire tracks found near her body were similar in size and tread design to the tires found on Miss Allen's car (T., pp. 718-723).

Roosevelt Green, Jr., arrived in Wampee, South Carolina, the next day in possession of Miss Allen's car and a rifle which was identified at the trial as the murder weapon.

Doretha Livingston, an estranged girl friend of Green, testified that Green told her, during his stay in Wampee, South Carolina, that he had "shot a woman somewhere in Georgia" (T., p. 538). No one else testified about the alleged statement, and same was never connected in any way to the murder of Miss Allen.

All of the evidence against the defendant at his trial was circumstantial in nature. None of the evidence directly tied Green to the murder. The State established that Green and Moore had been together the day of the murder, various facts implicating Moore in the murder, and the fact that Green ended up with the victim's automobile and the murder weapon. The evidence established that Moore lived about one block from the Majik Market from which the victim was abducted. Green was a migrant known by no one in the area except for Moore.

I. THE TRIAL OF GUILT OR INNOCENCE

Because the State's evidence could not sustain a conviction of rape, the State choose to try defendant Green only for the charge of murder. Though the evidence was purely circumstantial, the jury found Green guilty of murder. Said conviction was appealed to the Supreme Court of Georgia, the highest Court in said state, and affirmed on September 7, 1978. Motion for rehearing was made, and the Supreme Court of Georgia denied same on September 28, 1978. Petitioner Green appears before the Supreme Court of the United States only to question the validity of his death penalty.

II. THE PENALTY PHASE

Under §27-2534.1 of the Georgia Code (see Appendix B), the same jury that found the defendant guilty of the crime of murder immediately proceeded to the question of punishment of the defendant. The State introduced certified copies

of Green's prior convictions for second degree burglary and assault with intent to rob in the State of Alabama (T., pp. 1244-1249). The State presented the testimony of two experts from the Georgia State Crime Lab in an unsuccessful attempt to infer that the defendant had raped the victim (T., pp. 1107-1116). At the close of the evidentiary hearing of the penalty phase, defense counsel objected to the Court charging the jury as to rape as an aggravating circumstance (T., p. 1213). In the Trial Court's charge, the jury was not instructed that they might consider rape as an aggravated circumstance (T., pp. 1237-1241). The only other evidence relied upon by the State in the penalty phase was the evidence submitted upon the trial of the guilt or innocence of the defendant.

In mitigation the defendant offered the testimony of Thomas Pasby (T., pp. 1117-1141). The testimony of Thomas Pasby established the following:

(1) Pasby was a long-time close personal friend of Moore (T., p. 1118);

(2) On January 1, 1977, Pasby had a personal conversation with Moore concerning the rape, murder, kidnapping and armed robbery of Teresa Carol Allen (T., p. 1121);

(3) Pasby's testimony concerning said conversation was used by the State in the trial of the same indictment against Green's co-defendant, Carzell Moore, which trial resulted in a conviction of rape and murder and a sentence of death (T., pp. 1122-1123);

(4) Moore's statement to Pasby on January 1, 1977, amounted to a confession that Moore and Green had abducted the victim, that Moore had sent Green to get gasoline for the automobile at the time that Moore in fact shot and killed the victim, and that Green either did not know or did not believe that

Moore was about to kill the victim when Green left Moore and the victim at the scene of the crime (T., pp. 1123-1125).

Pasby's testimony concerning the confession of Moore went into detail; Moore told Pasby that he shot the girl twice with a 30.06 rifle, shooting her the first time in the stomach and the second time in her face, the shot to the face being specifically intended to make identification of the body difficult (T., p. 1125). The Trial Court admitted into the record, but not before the jury, the testimony that Pasby had given at the trial of Carzell Moore (T., pp. 1135-1137); the transcript appears on pages 1250-1321 of the transcript of the trial of Roosevelt Green, Jr.

In sustaining the State's objection to the testimony of Pasby on hearsay grounds, the Trial Court stated the following rationale:

> BY THE COURT: As I said, I can understand the rationale of these decisions. Now, under the Georgia death penalty statute, the State is permitted to put in evidence, any evidence that can be considered by a Jury as to what we in the legal field refer to as statutory aggravating circumstances. The defendant is permitted under the law to offer evidence of mitigating circumstances. Now, the point has been raised in this case that this witness, Mr. Pasby, was used by the State in prosecuting this defendant's co-defendant, Carzell Moore, for the offense of murder. This witness's testimony involved a confession or an alleged confession on the part of the defendant Carzell Moore and the record of this Court and the record from the Supreme Court of Georgia will show what the evidence is and will show what the Court charged the Jury, and the Court charged the Jury trying Carzell Moore on the law of confession and when that can be received and not received and so forth. Now, the State used this man's evidence to convict Carzell Moore upon the theory that Carzell Moore admitted shooting Miss Allen and the witness described the manner in which she was shot, the type of weapon, where she was shot and the reason why she was shot in the manner in which she was. Now, it seems to me that in saying what I have said, I have stated the case of the proposition of law as I understand it, which raises the issue of admissibility in this case. Now, so far as I am able to determine, we have had no decisions by our

appellate courts on this specific point as to where the rules of evidence may be relaxed on the sentencing phase where the death penalty is sought by the State. Now, the trial court must always exercise care and great caution in passing upon the admissibility of testimony, particularly in an area that we are talking about. If the Court should erroneously admit the testimony, harmful to the State, the State has no way to appeal or review that ruling. On the other hand, if the Court excludes the testimony, then the defendant would have the right to appeal and have the ruling corrected. Now, there is no case law that I know of as I have just indicated, that would guide the Court on this question except the cases of the import that you have just cited. My own personal feeling is that where the State has used a witness in a companion case and the evidence used was of such importance to the trial of that case that it was necessary or very vital to the proof required to sustain the verdict, that a co-defendant, as far as mitigation is concerned, ought to be allowed to use that evidence, not for the purpose of proving his innocence, but that's what your're dealing with there, but to show that in mitigation. Now, that's just a personal feeling or opinion of this Court but now, there is no exception that I know of to the holding in these cases and until there is a holding showing an exception to those rules, I feel that this Court is legally bound to follow these holdings or rulings in these cases. I think that Mr. Milam has correctly raised the point. It's purely and simply a legal point; it's not a factual point, as to the admissibility of his testimony. There's a good possibility that such testimony, under the circumstances of this case now, not this case, could be ruled admissible and if this witness had not been used by the State in a companion case, perhaps the defendant's position would not be as strong. On the other hand it might be, because the statute talks about the defendant offering evidence of mitigation of the offense alleged and the evidence as to mitigation can be rather broad. It seems to me, and I'm not trying to give direction to either side as to what you should do, but it seems to me that perhaps in order that this issue might be litigated, if it becomes necessary for that to be done, that a portion of the transcript of this witness's testimony that was offered in the Moore case be made a part of this transcript, so that it will show what was testified to by this witness in the Moore trial, and when that is done, I am going to sustain the State's objection to this line of testimony because if I am incorrect, it can be corrected. If I admitted it erroneously, then the injury done is irrevocable and cannot be corrected. (T., pp. 1132-1135).

In the trial of Carzell Moore upon the same indictment which was participated in by the same District Attorney, Assistant District Attorney, and Trial Court, the State offered the following testimony by Thomas Pasby:

Q Now, on the way to Hawkinsville when y'all were riding in this automobile, did y'all talk about anything?

A Yes.

Q Would you tell us what was said in this conversation and how it was brought up?

A He started asking me about how did I feel killing somebody when I was in Viet Nam.

Q And were you in Viet Nam?

A Yes, sir.

Q All right, just tell us what was said.

A And so, I told him, you know, the cause of killing somebody, you know, the only thing that I felt in Viet Nam was, you know, was why I was doing it and that was the only thing that I felt, and then he said, 'Well, I killed somebody, too.' So, when you said that, well, then he started telling me about he and Green went to the store and --

Q All right, now, would you tell us as best you can remember the exact words that he told you.

A He said that he and Green went to the Majik Market store and he told Green to go in and take the woman to the meat counter to attract her attention, you know, to Green while he comes in the front of the store with the rifle, and he said that they robbed the store --

Q Did he say whether Green did that?

A Yes, he said Green went in and he asked the girl something about some meat that was in the meat counter and she came over to the counter and then he came in and he said that he came in and they robbed the place, took the girl and her car and then they left.

Q Now, what, if anything, did he say happened after they got the girl and her car and they left?

A He said that on the way, Green turned around and looked at the girl and said, 'Bitch, take off your clothes.'

Q Did he say who was driving the car?

A He said that he was driving and said Green just turned around and looked at her and told her to take off her clothes.

Q And then what happened after Roosevelt Green said this?

A The girl said -- well, the girl started saying that she was a virgin and you know, not to do that, he said Green went on and did it and then --

Q I know sometimes it's hard to say, but I want you to say just exactly what he -- the same words that he told you. That's what I want you to tell the Jury. What did he say Green did?

A He said that Green got in the back and he fucked her and then Carzell said that he fucked her and he just scarred up hisself because she was a virgin and then they went on and he said then they got to another point, he didn't say where, and he said that he told Green to stop. At the time Green was driving then, he told Green to stop and he told the girl to get out. and he told Green to go and get some gas and he said when Green pulled off, he shot her.

BY THE COURT:

Q Who is 'he,' Carzell Moore?

A Carzell, yes, sir.

BY MR. WALDREP:

Q While Green was gone to get some gas?

A Right.

Q What did he say happened -- what did he say about the shooting?

A He said that when he shot her, she had her hands over her stomach like this, or something, and he shot her once in the stomach around here, up here someplace, and then he said he shot her again, he shot her -- he said he tried to shoot her through the face --

Q Did he say why he shot her in the face?

A He said he wanted to make it hard, in case somebody found her, that it would be hard for them to identify, so he shot her in the face and

he said when Green came back, they picked her up and when they picked her up, her hands fell, like one of her hands was gonna fall off and they threw her in the bushes. (T., pp. 1165-1168).

After the State was successful in suppressing the truth, the State took full advantage of the fact that the jury did not know the truth in closing arguments. While asking the jury to take the life of Roosevelt Green, Jr., the District Attorney made the following statement:

> It took two people to do this act and it took two people to kidnap her, it took two people to rob the store, it took two people to navigate the automobile with her in it all the way to Monroe County, and I submit to you that this is the other man who was involved in the case and who actively participated in it and it's impossible, of course, for the State or for you Ladies and Gentlemen to know who pulled that trigger out there because we were not there. We couldn't possibly bring any evidence other than the circumstantial evidence and the direct evidence that we had pointing to who did it, and I think it's especially significant for you to remember what Dr. Dawson said in this case. When the first shot, in his medical opinion, he stated that Miss Allen had positive blood pressure when both shots were fired but I don't know whether Carzell Moore fired the first shot and handed the gun to Roosevelt Green and he fired the second shot or whether it was vice versa or whether Roosevelt Green had the gun and f red the shot or Carzell Moore had the gun and fired the first shot or the second, but I think it can be reasonably stated that you Ladies and Gentlemen can believe that each one of them fired the shots so that they would be as equally involved and one did not exceed the other's part in the commission of this crime. Now, of course, Doretha Livingston stated that he told her he shot her. So all that, of course, is in aggravation of the conviction that you Ladies and Gentlemen can find. (T., pp. 1222-1223).

It should be noted that the District Attorney told the jury that the State "couldn't possibly bring any evidence other than circumstantial evidence and the direct evidence that we had pointing to who did it (T., p. 1222)," meaning that the State possessed no further evidence which would help

the jury in determining who had fired the shots,

The jury fixed punishment at death and found, as aggravating circumstances, that the offense was committed while the offender was engaged in kidnapping and armed robbery and further that the offense was outrageous and wantonly vile.

III. APPEAL

The conviction and sentence were appealed to the Supreme Court of the State of Georgia, the highest Court of said state, upon eighteen enumerations of error. The majority and dissenting opinions appear in Appendix A. On September 7, 1978, the majority affirmed the conviction and approved the penalty. The majority recognized the fact that "Carzell Moore had been tried and sentenced to death in an earlier trial and appellate review had not been completed in his trial" (Appendix A, p. 18). This fact is very important to explain the unavailability of Carzell Moore as a witness in the trial of Roosevelt Green, Jr. Because of his right to refuse to testify, the only way to get Moore's statement before the jury was through Pasby.

The majority opinion of the Georgia Supreme Court was as duplicitous as the actions of the State in the prosecution of the case. While finding that hearsay may not be used in mitigation of punishment, therefore ruling Moore's confession inadmissible, the Georgia Supreme Court tried to support the majority opinion with the conclusion that the confession of Moore "would show that the appellant actively and knowingly participated in the entire criminal enterprise" (Appendix A, p. 21). The majority went on to say, "The defendant's participation during the course of the criminal enterprise in leaving his kidnap victim with his armed accomplice on a lonely road while he went for gas could

not on any reasonable basis be termed minor participation." (Appendix A., p. 21). The majority ignored the fact that appellant's complaint was that the jury was not allowed to hear the testimony of Pasby. This is tantamount to a finding that, if the Trial Court erred in not permitting the jury to hear the evidence, same was harmless error because the jury should have sentenced Green to die even if they had been allowed to know the truth.

The Supreme Court of Georgia did not so state, but the majority opinion stands for the proposition that §27-2534.1(b) has been interpreted so as to severely limit defendant's right to prove facts in mitigation of punishment. (See Appendix B). The cited Code Section contains the following language: ". . . the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances of aggravating circumstances otherwise authorized by law. . . ." The majority opinion interprets that phrase as a mitigation of punishment, specifically incorporating §38-301 and §38-309 of the Georgia Code (see Appendix B). These two Code Sections exclude all hearsay and limit the declaration against interest exception to the hearsay rule to declarations by persons since deceased.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The issue of the admissibility of the testimony of Thomas Pasby as to the confession of Carzell Moore as a mitigating circumstance was raised in the Georgia Supreme Court in Enumeration of Error No. 17. During the trial, the admissibility of said testimony was urged upon the Trial Court strictly on the basis of federal due process and constitutional grounds (T., pp. 1129-1131). In support of this enumeration of error, defendant argued by brief

and oral argument that the present case was controlled by Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In the motion for rehearing the issue was argued on the basis of Lockett v. Ohio, 57 L. Ed. 2d 973 (1978) and Bell v. Ohio, 57 L. Ed. 2d 1010 (1978). The dissenting opinions of Justices Hall and Hill relied heavily upon these opinions and Brady v. Maryland, 373 US 83 (1963). The issue was treated as a constitutional question from the beginning.

The question presented in this petition relating to the constitutionality of the Georgia death penalty statute was not presented to the Georgia Supreme Court on direct appeal, as same did not become an issue until the ruling of the Supreme Court of Georgia in this case. The majority opinion of the Georgia Supreme Court narrowly interpreted the Georgia death penalty statute so as to incorporate the traditional rules of evidence relating to admissibility of hearsay. This was a gloss added upon the legislative enactment by court interpretation in the highest court of the State. It is petitioner's contention that by so doing the Georgia Court has rendered Georgia Code §27-2534.1 an unconstitutional statute, in violation of the holdings of the United States Supreme Court in Lockett v. Ohio, and Bell v. Ohio. The holding of the Georgia Court in this case demonstrates the unconstitutionality of said code section. In order to pass the requirements of the Eighth and Fourteenth Amendments, a death penalty statute must "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,"

(Lockett v. Ohio), 57 L. Ed. 2d 973, 990 (1978).

The majority opinion of the Georgia Supreme Court distinquished Chambers, ignored Lockett and Bell, and approved the sentence.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In this case the highest court of the State of Georgia has decided a question of federal constitutional law in a way not in accord with applicable decisions of the United States Supreme Court. While there are decisions of the United States Supreme Court which seem to control the issues presented by this petition, the exact factual situation has not heretofore been presented.

Petitioner is asking this Court to either allow the testimony of Thomas Pasby as an exception to the hearsay rule or declare that Georgia Code §27-2534.1, as interpreted by the Georgia Supreme Court in this case, is unconstitutional because it places unacceptable restrictions upon the defendant's right to present evidence in mitigation of punishment.

Georgia's general hearsay rule is stated in Georgia Code §38-301 (see Appendix B); said statute allows hearsay "only in specified cases from necessity." The testimony of Pasby is the only testimony as to the facts contained therein. The declarant, co-defendant Carzell Moore, was not available at the time of trial because of his constitutional privilege against self-incrimination. His case was on appeal to the Supreme Court of Georgia, and he still entertained a hope of obtaining a new trial. Moore would not testify at the trial of Roosevelt Green, Jr., and could not be forced to testify. Therefore in order for the jury to know what Moore had said to Pasby, the introduction of hearsay testimony was required. The fact situation in the

trial of Green is closest to the declaration against interest exception to the hearsay rule. This exception to the hearsay rule is based upon the premise that a person will not make a statement contrary to his own best interest, knowing that such statement is contrary to his own best interest, unless such statement is the truth. Since the object of all legal investigation is to discover the truth, it is believed that allowing hearsay evidence which qualifies as a declaration against interest, will assist the trier of fact in discovering the truth. The Georgia statute defining the declaration against interest exception, Georgia Code Section 38-309 (see Appendix B), is very narrowly drawn, limiting the exception to cases where the declarant is deceased. Petitioner acknowledges the fact that Moore was not deceased, but Moore was certainly unavailable as a witness. The Georgia Courts have interpreted this code section to include only declarations against the pecuniary or proprietary interest of the declarant, Little v. Stynchcombe, 227 Ga. 311, 180 S. E. 2d 541 (1971). But common sense leads us to conclude that Carzell Moore's declaration to Thomas Pasby was overwhelming against his interest and that he knew that the declaration was against his interest when he made it.

Under the Federal Rules of Evidence, Rule 804(a) and (b) (3), the statement of an out-of-court declarant is admissible when the declarant is unavailable ("on the ground of privilege") and where the statement is contrary to his penal interest. The Federal Rules were drawn in conformity with the holding of this Court in Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In Chambers v. Mississippi, Mr. Justice Powell spoke for eight members of this Court in reversing a similar case. In that case, as in the present case, the defendant offered

hearsay testimony to the effect that another person, other than the defendant on trial, had confessed to the murder committed. In that case, as in this case, the State objected on hearsay grounds and the testimony was excluded. This Court reversed, in spite of the fact that Mississippi recognized no declaration against penal interest exception to the hearsay rule, because the hearsay statements involved in that case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, this Court pointed out that the statements were made spontaneously to a close friend shortly after the murder, exactly as in this case. Secondly, the statements in Chambers were corroborated. In the trial of Roosevelt Green, Jr., Moore's involvement in the murder was corroborated by practically every State's witness. Thirdly, and exactly as in this case, this Court pointed out that whatever the parameters of the penal interest rationale, each confession was in a very real sense self-incriminating and unquestionably against interest. The holding of Chambers is that the hearsay rule may not be applied mechanistically to defeat the ends of justice and that the exclusion of the statements denied the defendant a trial in accord with traditional and fundamental standards of due process. In Chambers the statements were offered for the purpose of proving the defendant's innocence; in the Green trial the hearsay was offered solely in mitigation of punishment. The Green case is even more compelling than the Chambers case.

The recent decisions in Lockett v. Ohio, 57 L. Ed. 2d 973 (1978) and Bell v. Ohio, 57 L. Ed. 2d 1010 (1978), hold that, in capital cases, the Eighth and Fourteenth Amendments require that the sentencer not be precluded

from considering, as a mitigating factor, any aspect of the offense that the defendant proffers. Both cases dealt with defendants who had been found guilty of murder but wanted to show the sentencer that they did not actually commit the act of killing. The Ohio statute was incompatible with the constitution because it severely limited the mitigating circumstances that could be considered by the sentencer, and the Georgia statute, as interpreted by the highest court of Georgia, does likewise. The hearsay rule, as same was applied in the Green trial, excluded from consideration by the jury evidence which tended to show that Green was not the actual murderer and that he did not intend to be involved in a murder. The jury that sentenced Roosevelt Green, Jr., to die in the electric chair was not allowed to hear that the actual killer had made a complete confession in which he stated that Green was not present at the time of the actual killing and that the weapon was exclusively in the possession of Moore. In the trial of Green the State refused to allow the testimony of Pasby to be heard by the jury and tried the case on circumstantial evidence on the theory that Green shot the victim (T., p. 1015). Such a duplicitous approach to the trial of criminal defendants jointly indicted makes a mockery of the principle of fundamental fairness guaranteed as due process of law. Implicit in the concept of ordered liberty and due process of law is the notion that the State should seek to prove the truth and not suppress the truth for the sake of obtaining a sentence of death.

The issue to be determined by the jury in the sentencing hearing conducted in the trial of Green was the most serious issue that could ever be considered by a jury. Because the jury did not hear the statement of Carzell Moore, we cannot

know whether such evidence would have changed their decision. But we do know that they did not hear the whole truth. We do know that the State had presented the testimony of Pasby to the jury in the trial of Moore and had asked for and obtained a verdict of guilty and a sentence of death upon the strength of said testimony. The defendant in this case is pleading for his life; it is fundamentally unfair for the State of Georgia to take his life, after having stripped him of the only meaningful defense that he had.

As illustrated by the cited Federal Rule, the trend of the law is toward liberalization and expansion of the declaration against interest exception to the hearsay rule. In the case of Moore v. Atlanta Transit System, Inc., 105 Ga. App. 70 (1961), the Georgia Court of Appeals exhaustively discussed the Georgia cases dealing with exceptions to the hearsay rule on the basis of "necessity." All of the hearsay exceptions can be described as situations where the hearsay evidence sought to be introduced is necessary (usually the only method of proving the fact) and trustworthy (the evidence itself tends to support its credibility). The evidence that Green tried to introduce at this trial was absolutely necessary, because it was the only possible way that he could prove that Moore had stated unequivocably to a close friend that he, and not Green, had pulled the trigger which took the victim's life. The trustworthiness of the testimony is supported by the fact that the declaration was made shortly after the crime was committed, the fact that Moore made the statement to a close friend, and the fact that the statement had been relied upon by the State in the prior trial of Moore. Joseph H. Lumpkin, the first Chief Justice of the Supreme Court of Georgia, once wrote:

"Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict." Johnson State, 14 Ga. 55, 62 (1853).

CONCLUSION

Petitioner prays that a writ of certiorari issue to review the decision of the Georgia Supreme Court and to pass upon the constitutionality of Georgia Code §27-2534.1.

Repsectfully submitted,

GARLAND & MILAM, P.C.

BY: Richard Milam
RICHARD MILAM
ATTORNEY FOR PETITIONER

APPENDIX A

In the Supreme Court of Georgia Decided: SEP 7 1978

33696. GREEN v. THE STATE.

UNDERCOFLER, Presiding Justice.

Roosevelt Green, Jr., was convicted of the murder of Teresa Carol Allen and sentenced to death. The appellant is before this court on direct appeal of his conviction and for mandatory review of the death sentence.

Prior to this trial Carzell Moore was convicted of the murder and rape of Teresa Carol Allen and sentenced to death for both offenses. The convictions and death sentences of Moore were affirmed in Moore v. State, 240 Ga. 807 (SE2d) (1978). The evidence in Moore's trial adequately portrays the factual situation and will be repeated only where necessary for resolution of some issue.

I. Enumerations of Error

1. The first three enumerations all relate to the general ground of appeal in that they allege (1) the verdict and sentence are not supported by the evidence; (2) the verdict and sentence

are contrary to the law and the evidence; and (3) the trial court erred in overruling defendant's motion for a directed verdict of acquittal.

The only issue presented to this court by these enumerations is whether there is any evidence to support the verdict. Campbell v. State, 240 Ga. 352 (240 SE2d 828) (1977); Drake v. State, Ga. (SE2d) (Case # 33463, decided June 27, 1978); Bethay v. State, 235 Ga. 371 (219 SE2d 743) (1975); Ridley v. State, 236 Ga. 147 (223 SE2d 131) (1976). In making this determination we view the evidence in the light most favorable to the verdict rendered and resolve all conflict in the evidence in favor of the verdict. Eubanks v. State, 240 Ga. 544 (242 SE2d 41) (1978); Harris v. State, 236 Ga. 766 (225 SE2d 263)(1976); Myers v. State, 236 Ga. 677 (225 SE2d 53) (1976); Harris v. State, 234 Ga. 871 (218 SE2d 583) (1975).

From the evidence presented at the trial the jury was authorized to find the following:

a. The appellant was in the area where Miss Allen was robbed and kidnapped shortly before the crime without any means of transportation or funds.

b. He was not seen in the area after the kidnapping and robbery occurred.

c. The appellant appeared in South Carolina driving Teresa Allen's automobile (which he asked a friend to burn for him) approximately nine hours after the robbery and kidnapping.

d. The convenience store in Cochran that Miss Allen operated was robbed of bills and change. When he appeared in South Carolina, the appellant had in his possession a large quantity of money, both bills and change.

e. The appellant had the murder weapon in his possession when he arrived in South Carolina.

f. A glove found at the scene of the murder had hairs on it similar to those of both appellant and the victim.

g. Caucasian head hair identical to the hair of the victim was located on a sweater located in the appellant's suitcase.

h. Approximately twelve days after Teresa Allen had been shot to death in Monroe County, Georgia, the appellant told his girl friend that he had shot or killed a girl in Georgia.

The jury had before it ample evidence to support the verdict and the trial court did not err in overruling the appellant's motion for a directed verdict of acquittal.

Enumerations 1, 2, and 3 are without merit.

2. In Enumeration 4, the appellant alleges, "The Trial Court erred in denying defendant's Motion for a Change of Venue."

The appellant's motion was based on prejudicial pre-trial publicity.

When the appellant's motion for a change of venue was heard on January 6, 1978, the trial court withheld ruling until the voir dire examination of the jurors had been conducted.

In denying the motion of change of venue the trial court reflected that "it is the finding of the Court that the jurors that were put upon the defendant in this case were impartial; that they were not influenced, or would not or will not be influenced by what they may have read or heard about the case." The testimony of the prospective jurors supports this finding.

The trial judge did not abuse his discretion in denying the appellant's motion for change of venue. Campbell v. State, 240 Ga. 352 (240 SE2d 828) (1977); Young v. State, 239 Ga. 53 (236 SE2d 1) (1977); Wilkes v. State, 238 Ga. 57 (230 SE2d 867) (1976); Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976); Krist v. Caldwell, 230 Ga. 536 (198 SE2d 161) (1973).

3. In Enumeration 5, the appellant alleges, "The Trial Court erred in denying defendant's Motion to Suppress Evidence Illegally Seized."

The evidence sought to be suppressed by the appellant was a suitcase identified as belonging to the appellant that was located in a building where the appellant had no authority to be or to store his property. The appellant was neither landlord or tenant. Both the sometime tenant and the owner testified that the appellant had no authority to live there. The owner of the building opened the suitcase and examined the contents and then turned the suitcase with its contents over to the police.

"Probable cause and a warrant are not required for a search and seizure which is conducted pursuant to consent." Schneckloth v. Tustamonte, 412 U. S. 218 (93 SC 2041, 36 LE2d 854); McKendree v. State, 133 Ga. App. 295, 296 (211 SE2d 154) (1974); Hall v. State, 239 Ga. 832 (238 SE2d 912) (1977). "'[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' United States v. Matlock, 415 U. S. 164, 171 (94 SC 988, 39 LE2d 242) (1974)." Peek v. State, 239 Ga. 422 (2) (238 SE2d 12) (1977); Hall v. State, 239 Ga. 832, supra. In addition

to the valid permission given to seize the suitcase and its contents, the status of the appellant in relation to the building is such that he has no standing to challenge the search. Brown v. United States, 411 U. S. 223, 229-230 (1973).

Enumeration 5 is without merit.

4. In Enumeration 6, the appellant alleges, "The Trial Court erred in limiting defendant's right to cross examine the witness Charlie Livingston on the issue of his alleged identification of the rifle, State's Exhibit No. 6."

The right to cross examination, thorough and sifting, shall belong to every party as to the witnesses called against him. Code Ann. § 38-1705. This right is, however, subject to limitations to prevent abuse. In a case such as this one where the question asked had already been answered and the counsel had begun to be argumentative with the witness we cannot say the trial court abused its discretion. Control of the cross examination of a witness is to a great degree within the discretion of the trial court and will not be controlled unless abused. Eades v. State, 232 Ga. 735 (208 SE2d 791) (1974); McNabb v. State, 70 Ga. App. 798 (29 SE2d 643) (1944); Sweat v. State, 63 Ga. App. 299 (11 SE2d 40 (1940).

Enumeration 6 is without merit.

5. In Enumeration 7, the appellant alleges, "The Trial Court erred in sending the Jury out of the Courtroom, allowing the District Attorney to prompt his witness, and then allowing the District Attorney to cross examine and impeach his own witness, Charlie Livingston."

This enumeration is founded on the testimony of Charlie Livingston who could not remember at this trial the color of both of the money bags he had seen in the victim's car which was in the possession of the appellant when he arrived in South Carolina or the lettering that had been on the bags. When his memory was refreshed concerning his testimony at Carzell Moore's trial, he was able to testify concerning the color of the bags and his memory of the bags was restored. Later, all of these developments were brought to the jury's attention by appellant's counsel so that they were fully apprised of what had transpired. The witness later said he had misunderstood when the word "container" was used in asking about any money bags.

A witness may use any source to refresh his memory, so long as he testified from his memory thus refreshed. Agnor's Ga. Evid., § 4-10.

As long as the witness is willing to swear from his memory as refreshed, his memory may be refreshed by any kind of stimulus, "a song, or a face, or a newspaper item." Jewett v. United States, 15 F2d 955 (9th Cir., 1926). It was error to refuse to permit a medical witness to refresh his memory from x-ray photographs which he had not personally taken. Smith v. Morning News, Inc., 99 Ga. App. 547 (109 SE2d 639) (1959). A witness should be able to use almost any writing to refresh his memory. Hall v. State, 130 Ga. App. 233 (202 SE2d 674) (1973). See also Agnor's Ga. Evid., § 4-10.

No issue of impeachment of the State's own witness appears to be presented here. Code Ann. § 38-1801.

Enumeration 7 is without merit.

6. In Enumeration 8, "The Trial Court erred in denying defendant's Motion for a Mistrial upon the basis that defendant had been exhibited to the Jury in chains."

The appellant had previously escaped from confinement twice and precautions taken for his security were to employ a travel belt which consisted of a belt around the waist and one handcuff on each side so designed that one hand cannot reach the other. He was thus secured when returning from lunch on the day

in question. The appellant makes only a bare allegation. The evidence shows that a group of people was coming across the street as the appellant was entering the building where the trial was held. There is no testimony that they were jurors or that they were not jurors. There is no evidence that any of the people saw the defendant. Appellant did not testify in support of the allegation and defendant's attorney did not wish to have the jurors polled to determine if any of them had seen the defendant. As a precaution, the trial court instructed the jury that nothing seen or heard outside of the courtroom should affect their verdict.

The trial court did not err in overruling the appellant's motion for a mistrial. Morris v. State, 228 Ga. 39 (184 SE2d 82) (1971); Brand v. Wofford, 230 Ga. 750 (199 SE2d 231) (1973).

7. In Enumeration 9, the appellant alleges, "The Trial Court erred in denying defendant's Motion for a Mistrial based upon the inflammatory remarks of the District Attorney made in the presence of the Jury."

The remarks in question were made in the following context:

"BY MR. MILAM: Your Honor, now I object to the District Attorney telling us what the testimony was. These Jurors here have ears, they heard what the testimony was and they heard what

this man said. I also would ask that the Court instruct the Jury that the Court's statement as to what might or might not have been said, of course, is not evidence and it's not --

BY THE COURT: No, the Court does not intend that; I am just saying that the State is offering it for that purpose and for that purpose only and I'm not telling the Jury what the evidence is, but I am explaining to them why this particular evidence is being admitted, for that limited purpose only.

BY MR. SMITH: Well, Your Honor, as far as that is concerned, I know the Jury has ears, and so did the victim until somebody shot one off.

BY MR. MILAM: Your Honor, I object to that and I move --

BY THE COURT: I will sustain the objection.

BY MR. MILAM: I move the Court for a mistrial, too, Your Honor.

BY THE COURT: I think that statement was uncalled for and I admonish the District Attorney not to make statements like that anymore.

BY MR. SMITH: I apologize to the Court.

BY THE COURT: And I instruct the Jury to disregard it completely and don't let it have any bearing on whatever verdict you reach. You make a verdict based on the evidence.

BY MR. MILAM: You can come down."

We note there was evidence in the case from which the jury could have found that someone shot the victim's ear off, but assuming without deciding that the remarks of the District Attorney were improper, the refusal to grant the mistrial was not error under these circumstances. The corrective action taken by the trial court was the proper one for improper conduct by counsel. Code Ann. § 81-1009. Whether to grant a mistrial after taking precautionary measures is within the court's discretion. Code Ann. § 81-1009. McCorquodale v. State, 233 Ga. 369 (211 SE2d 577) (1974); James v. State, 215 Ga. 213 (109 SE2d 735) (1959). We find no abuse of discretion in refusing to grant a mistrial and the appellant declined to pursue the issue by renewal of his motion for a mistrial. Curtis v. State, 224 Ga. 870 (165 SE2d 150) (1968).

8. In Enumeration 10, the appellant alleges the trial court erred in admitting into evidence State's Exhibits 6, 8, 26, 27, 28, 31, 37, 38, 39, 40, and 41 over objection by the defendant.

a. Exhibits 6 and 8 were a rifle and rifle strap. There was evidence from which the jury could conclude that the rifle was in the possession of the appellant when he arrived in South Carolina and the strap was on the rifle. It is not necessary to

establish a chain of custody where a distinct physical object, such as a rifle, is identified. The rifle was identified by the owner of the rifle as well as the strap. There was evidence that the rifle fired the cartridge cases and lead jacket of the bullet found at the scene of the victim's body.

b. Exhibits 26, 27, and 28 being pieces of flesh, bone, and teeth, because of their proximity to the lead jacket and cartridge cases fired from the rifle were relevant for the jury's consideration of the causal connection between the rifle possessed by the appellant, the cartridges fired therefrom and injuries to the victim. Moore v. State, 240 Ga. 807, supra.

c. Exhibit 31 was identified as the bullet and two cartridge cases that were found at the scene and were properly admissible as indicated in 8 b above.

d. Exhibits 37, 38, 39, 40, and 41, photographs of the deceased taken at the funeral home just prior to autopsy, were properly admitted to illustrate the nature, the extent, and the location of the wounds. Moore v. State, 240 Ga. 807, supra at p. 816, and cases cited therein.

Enumeration 10 is without merit.

9. In Enumeration 11, the appellant alleges, "The Trial Court erred in overruling the defendant's objections to the

testimony of State's witness Clarence Sims based upon relevancy and due process."

During direct testimony Sheriff Bittick testified that the appellant had told him that he had stolen the change he had with him when he arrived in South Carolina from one Clarence Sims in Apopka, Florida. Later the court admitted, over objection, the testimony of Clarence Sims stating that he had not missed any money.

Possession of the change was circumstantial evidence. Circumstantial evidence is admissible. Code Ann. § 38-102. To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. Code Ann. § 38-109. Accordingly, the prosecution had a duty to rebut any reasonable hypothesis that the appellant obtained the change other than from the victim who was murdered. Negative evidence is admissible as well as positive evidence. Code Ann. § 38-111.

Enumeration 11 is without merit.

10. In Enumeration 12, the appellant alleges, "The Trial Court erred in admitting over objection the testimony of Sheriff

L. C. Bittick relating to a statement or statements allegedly made by the defendant while being transported by said State's witness. The witness could not recall sufficient facts for the Court to determine whether the alleged statement or statements were freely and voluntarily made. The burden of proving same is upon the State. The Court's admission of said testimony without sufficient showing was violative of the defendant's right to be confronted by his accusers and his right to cross examine the witness."

At a Jackson-Denno type hearing outside the presence of the jury, the sheriff testified that the appellant was allowed to read his rights under the "Miranda decision" from a form. He said he was twenty years old and had a tenth grade education in public school in Alabama. The sheriff identified himself and the appellant read the form to himself and signed it. He was asked if he understood it and he said he had. Sheriff Bittick testified the appellant indicated he was willing to talk to them but did not indicate he wanted a lawyer. He further testified the statement was freely and voluntarily made and no promise was made or threat or coercion used to get him to talk. The trial court found that any statements he may have made was done of his own accord, without

coercion, voluntarily, without any hope of reward, without any threat and that it was a statement made on an inquiry of his own. The statements were made in the car on the way to Atlanta from South Carolina and consisted of asking the manner in which the sheriff found or located the rifle (in earlier statements the appellant had never mentioned a rifle being in the car) and inquiring if Georgia had the death penalty.

The State met the burden of satisfying the trial court of the voluntariness of the statements and there is no reason to disturb that finding. Any questions concerning the clarity of the witness's memory are properly questions for the jury in determining the credibility of witnesses. Code Ann. § 38-1805.

Enumeration 12 is without merit.

11. In Enumerations 13 and 14, the appellant alleges the trial court erred in admitting evidence of prior convictions of defendant without proof that defendant was represented by counsel at the time of such convictions and prior to allowing any showing by the defendant that he was unrepresented at the time of the prior convictions.

The appellant had been placed on notice that the State would introduce evidence of the two prior convictions in aggravation in accord with Code Ann. § 27-2503. They were properly

authenticated and the documents indicate on their face "the defendant in his own proper person and by his attorney" was arraigned and entered pleas of guilty. The trial court admitted the convictions initially with permission for the appellant to put up whatever evidence might be appropriate. The appellant subsequently testified that he had a lawyer with him but the lawyer did nothing but "stand by him while he got his time."

Under these circumstances we cannot say that the trial court acted without proper basis in admitting the evidence of prior convictions. Potts v. State, 241 Ga. 67 (83) SE2d) (1978).

Enumerations 13 and 14 are without merit.

12. In Enumeration 15 the appellant alleges, "The Trial Court erred in allowing the Jury to consider State Exhibits No. 26, 27, and 28 in the Sentencing Stage of the Trial, over objection, upon the ground that same had no probative value and could only inflame the Jurors' minds."

These particular exhibits were admitted in evidence on the issue of guilt or innocence.

In a pre-sentence hearing the judge (or jury) shall hear additional evidence in extenuation, mitigation, and aggravation of punishment. Code Ann. § 27-2503. The pre-sentence hearing is for

additional evidence and in no way excludes from consideration on the sentence evidence heard on the issue of guilt or innocence. Eberheart v. State, 232 Ga. 247, 253 (206 SE2d 12) (1974); Hooks v. State, 233 Ga. 149 (2) (210 SE2d 668) (1974). (Both interpreting similar language in the former section on pre-sentence hearings, Code Ann. § 27-2534.)

Additionally, these exhibits were relevant to a determination of one of the statutory aggravating circumstances found by the jury that "The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant."

Enumeration 15 is without merit.

13. The appellant's contention in Enumeration 16, that the aggravating circumstance relating to the commission of murder during the commission of other capital felonies was inapplicable because armed robbery and kidnapping are no longer capital felonies is without merit.

This issue has been addressed by this court and resolved contrary to the appellant's position. Peek v. State, 239 Ga. 422, 431-432 (238 SE2d 12) (1977).

14. In Enumeration 17, the appellant alleges, "The Trial Court erred in refusing to admit the testimony of defendant's witness Thomas Pasby as a mitigating circumstance."

During the pre-sentence hearing the appellant attempted to introduce the testimony of Thomas Pasby to the effect that the co-defendant, Carzell Moore, told him (Pasby) that he (Moore), and not the appellant, was the actual perpetrator of the murder. The trial court sustained the State's objection to the testimony on the grounds that it was hearsay. Carzell Moore had been tried and sentenced to death in an earlier trial and appellate review had not yet been completed in his trial. Appellant was permitted to examine Thomas Pasby outside the hearing of the court to show what he intended to introduce and thereafter introduced a copy of Pasby's testimony in the trial of Carzell Moore for consideration on appeal of the propriety of the trial court's ruling.

In Little v. Stynchcombe, 227 Ga. 311 (2) (180 SE2d 541) (1971) this court held: "Counsel for the appellant attempted to have a witness testify that another person had made statements admitting the crimes for which the appellant was convicted. The State objected to such evidence on the basis that it was hearsay.

"Code § 38-301 provides: 'Hearsay evidence is that which does not derive its value solely from the credit of the witness,

but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.'" Furthermore, "Declarations by another person to the effect that he, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon his trial." Bryant v. State, 197 Ga. 641 (9) (30 SE2d 259) (1944); Beach v. State, 138 Ga. 265 (75 SE 139) (1912); Robinson v. State, 114 Ga. 445 (40 SE 253) (1901). This has been the law in Georgia for over one hundred years. Lowry v. State, 100 Ga. 574 (28 SE 419) (1897); Delk v. State, 99 Ga. 667 (3) (26 SE 752) (1896); Briscoe v. State, 95 Ga. 496 (20 SE 211) (1894); Woolfolk v. State, 85 Ga. 69 (15) (11 SE 814) (1890); Kelly v. State, 82 Ga. 441 (2) (9 SE 171) (1889); Daniel v. State, 65 Ga. 399 (1) (1880); Lyons v. State, 22 Ga. 399 (1) (1857).

The trial court did not err under the law of this State.

The appellant urges that the testimony of Thomas Pasby was admissible as a mitigating circumstance and urges its admission here as a case of necessity as an exception to the hearsay rule although recognizing that declarations against interest must be against pecuniary interest and not penal interest, citing

Moore v. Atlanta Transit System, Inc., 105 Ga. App. 70 (SE) (1961), and quoting from Jasper County v. Butts County, 147 Ga. 672 (95 SE 254) (1918): "The modern tendency is to relax rathe than to restrict the rules for the admission of evidence, to the end that the discovery of truth may be aided, rather than obstructed." This court has not, however, recognized an exception to the hearsay rule in the circumstances urged by the appellant.

Appellant relies on the United States Supreme Court case of Chambers v. Mississippi, 410 U. S. 284 (93 SC 1038, 35 LE2d 297) (1973) in support of his position that the court should have relaxed the long standing rule of evidence in this State. The Supreme Court of the United States there mandated a relaxation of the penal interest limitation on the declaration against interest exception to the hearsay rule in the particular posture of the facts in that case. The situation in the appellant's case is clearly distinguishable. In Chambers the only offense with Chambers' alleged involvement was the killing of a policeman with no evidence of a conspiracy or of concerted criminal activity that would make Chambers guilty of the crime on a conspiracy or accomplice theory.

In the instant case, the appellant did not offer the testimony of Pasby on the issue of guilt or innocence, but instead

offered it in mitigation of punishment. If the testimony of Pasby were put in evidence he would of necessity be required to relate Carzell Moore's statement to him rather than simply to state the conclusion that Carzell Moore said he had killed her. If so, his testimony would show that the appellant actively and knowingly participated in the entire criminal enterprise including the robbery, kidnapping, and rape of the victim and left her on a lonely road with Moore who was armed and had told the appellant how he could kill, went for gas while Moore killed her, and helped throw her body into the bushes. He then took a portion of the robbery proceeds and left the State with the victim's car and the murder weapon.

Although this state has not enumerated specific mitigating circumstances, some authorities do recognize as a mitigating circumstance that "a defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor constitutes a mitigating circumstance." The defendant's participation during the course of the criminal enterprise in leaving his kidnap victim with his armed accomplice on a lonely road while he went for gas could not on any reasonable basis be termed minor participation.

While we do not hold that there would never be a case in which the declaration against interest exception to the hearsay rule should be extended to declarations against penal interest, the facts of the appellant's case do not justify such an extension.

Accordingly, enumeration 17 is without merit.

15. In Enumeration 18, the appellant alleges: "The Trial Court erred in instructing the Jury as follows: The Court charges you that the Jury would not be authorized to consider imposing the death penalty unless you find one or more of the alleged statutory aggravating circumstances which the State contends existed at the time of the alleged offense. Said charge failed to inform the Jury that it was necessary that they find the statutory aggravating circumstance beyond a reasonable doubt."

We must examine the charge in its entirety in determining its sufficiency. Johnson v. State, 237 Ga. 495 (228 SE2d 879) (1976). Four times during his charge on the sentence the trial court instructed the jury that the statutory aggravating circumstances must be found to be present beyond a reasonable doubt. We believe the jury was adequately and clearly charged on this point.

Enumeration 18 is without merit.

II. SENTENCE REVIEW

The death penalty imposed in this case must conform to the standards set forth in Code Ann. § 27-2534.1 to authorize affirmance. This court must determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's findings of statutory aggravating circumstances; and, whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, as required by Code Ann. § 27-2537 (c) (1-3).

We have reviewed the trial transcript and record and have made a comparison of the evidence and sentences in similar cases pursuant to the mandate of the statute. We have considered enumerations of error 13, 14, 15, 16, 17, and 18, as requested by the appellant. Using the standards prescribed for our review by the statute, we conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In recommending the death penalty the jury found the following statutory aggravating circumstances:

1. The offense of murder was committed while the offender was engaged in the commission of additional capital felonies, to wit: kidnapping and armed robbery of Teresa Carol Allen (Code Ann. § 27-2534.1 (b) (2); and

2. The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture of the victim and depravity of mind on the part of the defendant. (Code Ann. § 27-2534.1 (b) (7).

The evidence supports the jury's findings of statutory aggravating circumstances and the verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed and find the similar cases listed in the appendix support the affirmance of the death penalty in this case. Roosevelt Green, Jr's, sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Hall and Hill, J.J., who dissent.

APPENDIX

1. House v. State, 232 Ga. 140 (205 SE2d 217) (1974).
2. Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974).
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1975).
4. Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975).
5. Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975).
6. Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975).
7. Berryhill v. State, 235 Ga. 549 (221 SE2d 185) (1975).
8. Goodwin v. State, 236 Ga. 339 (233 SE2d 703) (1976).
9. Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976).
10. Pulliam v. State, 236 Ga. 460 (236 SE2d 460) (1976).
11. Gibson v. State, 236 Ga. 874 (226 SE2d 63) (1976).
12. Corn v. State, 240 Ga. 130 (SE2d) (1977).
13. Moore v. State, 240 Ga. 807 (SE2d) (1978).
14. Davis v. State, Ga. (SE2d)
(Case # 30635, decided June 16, 1978)

HALL, Justice, dissenting to division 14 and the sentence.

In my opinion the trial court erred in refusing to admit the testimony of defendant's witness Thomas Pasby as a mitigating circumstance. Pasby had testified for the state in the trial of Carzell Moore that Moore had told him that he (Moore), and not the appellant, was the actual perpetrator of the murder. When the same testimony was offered in this case by Green as a mitigating circumstance, the state objected on the ground of hearsay and the trial court sustained the objection. Based upon the peculiar circumstances of this case, it is my opinion that the evidence should have been admitted. The normal rules of evidence should not be automatically applied to every aspect of the sentencing phase of the trial where the issue may be death or mercy. "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques - probation, parole, work furloughs, to name a few - and various post conviction remedies, may be available to modify an intitial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sencence. There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 46 LW. 4981, 4986-4987 (1978). The Court pointed out that in upholding the Georgia statute in Gregg v. Georgia, 428 US 153 (1976) it "noted that the statute permitted the jury 'to consider any aggravating or mitigating circumstances', see Gregg, supra, at 206, and that the Georgia Supreme Court had approved 'open and far ranging argument' in presentence hearings, id., at 203. Lockett, supra at 4987. In footnote 14, it "noted that the Georgia legislature had decided to permit 'the jury to dispense mercy on the basis of factors too intangible to write into a statute.' Gregg, 428 US , at 222." Lockett, supra at 4987.

This interpretation was restated in a recent decision of this court where we held that the "conclusion is inescapable that the legislature meant to empower the jury to consider as migigating anything they found to be mitigating, without limitation or definition." Spivey v. State, 241 Ga. 477, 479 (SE2d) (1978).

Pasby's testimony is an aggravating circumstance when considered in the sentencing phase of Moore's trial as well as a mitigating circumstance when considered in the sentencing phase of Green's trial. The state introduced the evidence in Moore and objected to its admission in Green. I would not allow the state to take such inconsistent positions where the choice is between life and death.

HILL, Justice, dissenting.

I join Justice Hall's dissent for the reasons he has expressed and for the further reason that here the state's hearsay objection has the legal effect of suppressing evidence favorable to the defense on which the state relied in another case. This violates the principle set forth in Brady v. Maryland, 373 U. S. 83 (83 SC 1194, 10 LE2d 215) (1963), just as much as if the state had concealed from this defendant the existence of Pasby's mitigating testimony. Brady serves only a very limited purpose if the state can exclude from the trial material which Brady would require the state to make known to the defendant, and on which the state relies in securing the conviction of a codefendant.

APPENDIX B

Ga. Laws of 1973, pp. 159, 163

Section 27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record or conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section

27-2534.1(b) is so found, the death penalty shall not be imposed.

Georgia Code Section 38-3. Hearsay

Section 38-301 Definition; when and why admitted

Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.

Section 38-309 Declarations and entries by deceased persons

The declarations and entries by a person, since deceased against his interest, and not made with a view to pending litigation, shall be admissible in evidence in any case.